CLOSED SESSION DECISIONS – VOTE TO SELECT DEVELOPER IN MEETING PROPERLY CLOSED UNDER §10-508(a)(14), HELD TO BE PERMITTED

March 9, 2007

Mr. Timothy A. Franklin
Editor
The Baltimore Sun

The Open Meetings Compliance Board has considered your complaint that the Board of Directors of the Baltimore Development Corporation ("BDC") violated the Open Meetings Act when, at a meeting on December 21, 2006, the BDC board voted in closed session to recommend selection of a developer for the Gateway South project. For the reasons stated below, the Compliance Board finds that there was no violation.

I

Complaint and Response

The BDC board meeting of December 21, 2006, began in open session. At some point, as described in the complaint, "a motion was made ... to go into closed session to review the financial details of a deal involving the awarding of a project known as Gateway South, an 11-acre industrial site south of M & T Bank Stadium." The complaint did not object to the closed session as a whole, recognizing the Act's exception for certain discussions during a competitive bidding or proposal process. "But during the closed session," the complaint continued, "the BDC board went beyond simply discussing the private financial information related to the Gateway South project. The board took a final vote on which developer it would recommend for the project." Although reporters and members of the public were informed of the BDC board's decision immediately after the meeting, the complaint was of the view that the BDC board "violated Maryland's Open Meetings Act by voting in private session on awarding a major City development deal."

In a timely response on behalf of the BDC board, Assistant City Solicitor Cary Berkeley Kaye denied that the Act had been violated. The meeting was closed in reliance on two exceptions within the Open Meetings Act: §10-508(a)(2), which allows a closed session to "protect the privacy or reputation of individuals with respect to a matter that is not related to public business"; and §10-508(a)(14), which allows a closed session "before a contract is awarded or bids are opened, [to] discuss

a matter directly related to a negotiating strategy or the contents of a bid or proposal, if public discussion or disclosure would adversely the impact the ability of the public body to participate in the competitive bidding or proposal process."[1] The response contended that the discussion was confined to these matters, and that the vote to recommend one of the two proposals was a permissible activity in the closed session. The response included confidential draft minutes for the closed session, which we shall refer to in general terms but which remain confidential. §10-502.5(c)(2)(iii).[2]

II

Analysis

We first consider whether the meeting was permissibly closed. In our view, the BDC board erred when it invoked §10-508(a)(2). Although we accept that discussion referring to private information about individuals was foreseeable, the exception also requires that the matter under discussion is one "not related to public business." Manifestly, the Gateway South development issue does relate to public business. This personal privacy exception should not have been invoked.

However, the BDC board properly invoked §10-508(a)(14). When the BDC board wanted to discuss the merits of the competing development proposals, board members needed an opportunity to discuss the strengths and weaknesses of the proposals and the comparative importance of the BDC board's financial and economic development objectives for the project. A candid discussion of this kind would be difficult in open session, as the General Assembly recognized, and so we conclude that the BDC board properly invoked the exception related to discussion of competitive bids or proposals, §10-508(a)(14). Our review of the confidential minutes confirms that the discussion was limited to topics within this exception.

We now turn to the heart of the complaint – that the meeting, although permitted to be closed, could not remain closed for the final vote on the choice of developer.

---

[1] All statutory references are to the State Government Article, Annotated Code of Maryland. We note that the BDC had previously taken the position that it was not a "public body"subject to the Open Meetings Act. In *City of Baltimore Development Corp. v. Carmel Realty Associates.*, 395 Md. 299 (2006), the Court of Appeals held that it was indeed subject to the Act.

[2] In closing the session, the presiding officer apparently failed to prepare the written statement required by §10-508(d)(2). The response noted that the BDC board has now corrected its procedures to adhere to this requirement.

Under §10-508(b), "A public body that meets in closed session under this section may not discuss or act on any matter not permitted under subsection (a) of this section." This provision was recently applied by the Court of Appeals in an analogous situation. The Board of Aldermen of Frederick closed a meeting to consider the acquisition of real property for a parking garage.[3] While in the closed session, the aldermen not only discussed whether to proceed by condemnation but also voted to do so. In a suit challenging the condemnation decision, the property owner argued, among other points, that the Open Meetings Act barred a final vote in the closed session. The Court of Appeals disagreed. It held that "there is no ambiguity in the plain language" of §10-508(b), which explicitly recognizes that, while in closed session, a public body might not only "discuss" but also "act on" a matter. *J.P. Delphey Limited Partnership v. Mayor & Council of Frederick,* 396 Md. 180, 201-02 (2006).[4] Discussion and action, in other words, are on a par. If either exceeds the boundaries of the exception under which the meeting was closed, there is a violation. Conversely, if the public body's discussion *and* final action remain within the confines of the exception, there is no violation.

In this case, the motion and vote to choose one developer over the other was surely "directly related to ... the contents of a ... proposal," and the BDC board could reasonably fear that public conduct of the vote "would adversely impact the ability of the public body to participate ... in the proposal process." Once a motion is made, further debate often occurs. Members might wish to explain their forthcoming votes by reference to the sensitive financial and other considerations that justified the closing of the meeting. In short, the culmination of the discussion, the vote, was not divorced from the concerns that are identified in the exception and that led to the closed session. Rather, that action was part of the session permitted to be closed under §10-508(a)(14).

III

Conclusion

In summary, the Open Meetings Compliance Boards finds the Board of Directors of the Baltimore Development Corporation did not violate the Open

---

[3] This exception is found in § 10-508(a)(3).

[4] That final action in a closed session is permissible is further evidenced by language in the Act's provision on after-the-fact disclosure about closed sessions. The minutes of the next open meeting following a closed one are to disclose, among other things, "a listing of the topics of discussion, persons present, and *each action taken* during the [closed] session." § 10-509(c)(2)(iv).

Meetings Act by voting in closed session to recommend a particular developer for the Gateway South project.

OPEN MEETINGS COMPLIANCE BOARD

Courtney J. McKeldin
Tyler G. Webb